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Napue, Brady, & Giglio- The Many Heads of the Hydra

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Napue, Giglio, Jencks & Brady — The Many Heads of the Hydra

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The Legend of the Hydra



"The Hydra had nine heads, of which the middle one was immortal. Hercules struck off its heads with his club, but in the place of the head knocked off, two new ones grew forth each time."

THE HYDRA. (PACIFIC) PACIFIC MYTHS AND LEGENDS.

Napue – The First Head

Napue v. Illinois, 360 U.S. 264 (1959)

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness."

Id. at 269.

Napue – The First Head

- **Facts:**
 - Napue was tried and convicted of the 1938 murder of a Chicago policeman.
 - State's key witness at trial was a co-defendant, Hamer, serving 99 years for his participation.
 - Post-conviction filing of prosecutor showed—contrary to trial testimony—that Hamer had been promised leniency for his testimony.
- **Issue on Appeal:**
 - Did prosecutor's failure to correct false testimony violate Napue's due process rights?

Napue – The First Head

Cross Examination:

Q. Did anybody give you a reward or promise you a reward for testimony?

A. **There ain't nobody promised me anything.**

Redirect:

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. **You did not.**

-Trial Testimony of George Hamer

Napue – The First Head

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

- Id. at 270 (emphasis added and citation omitted).

To Establish a "Napue" Violation

Three-prong test...

1) _____

2) ** _____

3) ** _____

WHAT'S THE LAW HERE??

Do you wanna ride?



ARIZONA'S "NAPUE"

Arizona v. Ferrari, 112 Ariz. 324 (Ariz. 1975)

"Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of showing prejudice to the defendant."

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Giglio – The Second Head

Giglio v. United States, 405 U.S. 150 (1972)



Giglio – The Second Head

• Facts:

- Giglio was tried and convicted of passing forged money orders and sentenced to five years in prison, largely based on the testimony of co-conspirator Taliento.
- Giglio was indicted by one AUSA, DiPaola, who promised Taliento immunity in exchange for his testimony. Giglio was then tried by a second AUSA, Golden, who was unaware of the agreement and did not disclose it.

• Issue on Appeal:

- Did the prosecutor's failure to disclose the agreement violate Giglio's due process rights?

Giglio – The Second Head

Cross Examination:

Q: Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

A: **Nobody told me I wouldn't be prosecuted.**

Q: They told you you might not be prosecuted?

A: **I believe I still could be prosecuted.**

- Trial testimony of Robert Taliento

Giglio – The Second Head

Cross Examination:

Q: Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

A: **Not at that particular time.**

Q: To this date, have you been charged with any crime?

A: **Not that I know of, unless they are still going to prosecute.**

- Trial testimony of Robert Talento

Giglio – The Second Head

"[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."

-Giglio, 405 U.S. at 254 (emphasis added).

WHAT'S THE LAW HERE??

ARIZONA'S "GIGLIO"

Arizona v. Serna, 163 Ariz. 260 (Ariz. 1990)

"It is firmly established that the state cannot knowingly conceal any leniency agreement entered into with a material witness."

Id. at 264.

ARIZONA'S "GIGLIO"

Arizona v. Lukezic, 143 Ariz. 60 (Ariz. 1984)

- Facts:
 - Lukezic was tried and convicted of 11 crimes including two counts of first degree murder and one count of conspiracy to commit murder.
- Issue on Appeal:
 - Did the prosecutor's failure to disclose the assistance two key witnesses received violate Lukezic's due process rights?

ARIZONA'S "GIGLIO"

"Whether these witnesses received benefits due to prosecutorial design or inexcusable neglect is immaterial, because the prosecution is to blame in either case. We certainly do not subscribe to the cavalier philosophy that the state can do no evil when acting in the name of the good."

Id. at 68 (emphasis added).

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Jencks – The Third Head

Jencks v. United States, 353 U.S. 657 (1957)
The Jencks Act, 18 U.S.C. § 3500

"We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. . . . Justice requires no less."

- *Jencks*, *supra*, at 669.

Jencks – The Third Head

- **Facts:**

- Jencks was tried and convicted of falsely swearing that he was not a communist.
- At trial the prosecution relied on the testimony of two informants, both of whom testified that they had made regular oral and written reports to the FBI agents who supervised them.
- Following their testimony, Jencks moved the Court to require these reports be produced. The Court denied the motion.

- **Issue on Appeal:**

- Was the non-production of these reports in error?

Jencks – The Third Head

The Jencks Act, 18 U.S.C.A. § 3500

"After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

-Id.

WHAT'S THE LAW HERE??

RULE 15

Arizona v. Gulbrandson, 184 Ariz. 46 (Ariz. 1995)

"Defendant has a due process right to timely disclosure of _____ evidence."

Id. at 63 (emphasis added).

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Brady – The Immortal Head

Brady v. Maryland, 373 U.S. 83 (1963)

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

-Id. at 89.

Brady – The Immortal Head

■ Facts:

- Brady and a co-defendant, Boblit, were separately tried and convicted of a 1958 murder committed in the course of a bank robbery. Both were sentenced to death.
- The prosecution disclosed four signed confessions of Boblit implicating Brady as the person who actually murdered the victim, but did not disclose a fifth unsigned confession indicating Boblit had done the deed.

■ Issue on Appeal:

- Did prosecutor's failure to disclose the unsigned confession violate Brady's due process rights?

Brady – The Immortal Head

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

-Id. at 87 (emphasis added).

"Brady" Requirements Generally

Due Process Requires that:

- 1) The Govt. has _____ to disclose material evidence favorable to the Defendant in its possession;
- 2) Evidence affecting _____ of a Govt. witness is "material" ; and
- 3) Failure to disclose is in error regardless of _____ of the prosecutor.

WHAT'S THE LAW HERE??

RULE 15.1(b)(8)

Arizona v. Jessen, 130 Ariz. 1 (Ariz. 1981)

"While Brady is in a sense a rule of discovery, it is more correctly a rule designed to protect the right of a defendant to a fair trial."

- *Id.* at 4.

RULE 15.1(b)(8)

Arizona v. Jessen, 130 Ariz. 1 (Ariz. 1981)

"The disclosure required of the State under Rule 15.1, Arizona Rules of Criminal Procedure, is broader than the requirements of Brady. There may be violations of Rule 15.1, although arguably harmless, where there is no Brady violation."

- *Id.*

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Evolution of the Beast



Establishing a Brady Violation

Defendant must show that evidence was:

- 1) _____ to him / her;
- 2) _____ by the Government (willfully or inadvertently); and
- 3) _____.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999)

Standard of Review

United States v. Bagley, 473 U.S. 667 (1985)

"The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt."

¹⁰ *Id.* at 698 (Marshall, T., dissenting).

Standard of Review

- Facts:
 - Bagley was tried on 15 counts of weapons and narcotics charges.
 - Government's two principal witnesses were two railroad security guards who had assisted the ATF. Both had signed affidavits documenting their interactions with Bagley. The affidavits indicated the statements were given without reward or promise of reward.
 - Post-trial, evidence was discovered both men had signed ATF contracts for providing information and received \$300 after his conviction.
- Issue on Appeal:
 - Did the prosecutor's failure to disclose the agreements require automatic reversal?

Standard of Review

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Green, *supra* (citing Bagley, 473 U.S. at 682).

Sliding Scale...

Arizona v. Bracy, 145 Ariz. 520 (Ariz. 1985)

- 1) _____
- 2) _____
- 3) _____

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In Camera Review

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)



In Camera Review

■ Facts:

- Ritchie was convicted of the rape of his 13 year-old daughter and sentenced to 3 to 10 years in prison.
- Ritchie had requested the Children and Youth Services file during pre-trial discovery. The file was deemed privileged by the trial court and the request was denied.
- The Pennsylvania Supreme Court vacated the convictions, finding the trial court erred in not disclosing the entire privileged file.

■ Issue on Appeal:

- Did the court err in requiring the entire file be disclosed to Ritchie?

In Camera Review

"In a typical case where a defendant makes [a] . . . request for exculpatory material under *Brady* . . . it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final."

•Ritchie, 480 U.S. at 59

In Camera Review

Arizona v. Acinelli, 191 Ariz. 66 (Ariz. App. 1997)

Arizona v. Robles, 182 Ariz. 268 (Ariz. App. 1995)

Materials Not in Possession of the Prosecutor

Kyles v. Whitley, 514 U.S. 419 (1995)



Materials Not in Possession of the Prosecutor

Facts:

- Kyles was convicted of the 1984 murder and robbery of a 60 year-old woman and sentenced to death.
- Kyles' conviction was based, in part, on information provided by Joseph "Beanie" Wallace. At trial Kyles portrayed Beanie as the shooter.
- Conflicting statements of Beanie and additional witness statements never disclosed to either prosecution or defense.

Issue on Appeal:

- Did the failure of the prosecution to disclose interview notes and documents in the possession of NOPD detectives constitute a denial of Kyles' due process rights?

Materials Not in Possession of the Prosecutor

"This . . . means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. . . . [W]hether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."

-Kyles, 514 U.S. at 437-38.

Materials Not in Possession of the Prosecutor

Romley v. Hon. Gottsfield, 172 Ariz. 232 (Ariz. App. 1992)

"[T]he [Victim's Bill of Rights] should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial"

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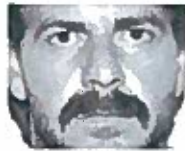
A.B.A. Model Rules

"The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."

-MODEL RULES OF PROF'L CONDUCT R. 3.8(d)

"Open File" Jurisdictions

Strickler v. Greene, 527 U.S. 263 (1999)



"Open File" Jurisdictions

■ Facts:

- Strickler and co-defendant Henderson were separately tried and convicted of the 1990 kidnapping and murder of a college sophomore. Strickler was sentenced to death.
- Strickler's conviction was based, in part, on the trial identification of witness Anne Stoltzfus. Notes from a pre-trial witness statement given by Stoltzfus and letters she wrote to the investigating officer were never given to the prosecution.
- Strickler was tried in August County, Virginia, which maintained an "open file" policy. As such, counsel for Strickler never requested any Brady documents.

■ Issue on Appeal:

- Did the prosecution's use of an "open file" policy create a reasonable expectation by defense counsel that all exculpatory materials would be located in the file?

"Open File" Jurisdictions

"[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."

Strickler, 527 U.S. at 283, n. 23.

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Defense Due Diligence?

Banks v. Dretke, 540 U.S. 668 (2004)



Defense Due Diligence?

• Facts:

- Banks was convicted of the 1980 murder of a 16 year-old in Nash, Texas.
- Banks' conviction was based, in part, on the trial testimony of Robert Farr. Unknown to the prosecutor—and undisclosed to the defense—was that Farr had been paid by a deputy sheriff.

• Issue on Appeal:

- Did the failure of the prosecution to disclose Farr's status as a paid informant and to correct trial testimony to the contrary constitute a denial of Banks' due process rights?

Defense Due Diligence?

"Willie Huff asked me to help him find Delma's gun. I told [Huff] that he would have to pay me money right away for my help on the case. I think altogether he gave me about \$200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder."

- 1999 Affidavit of Robert Farr

Defense Due Diligence?

"Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. . . . [D]efense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'"

Id. at 695-96 (citation omitted and emphasis added).

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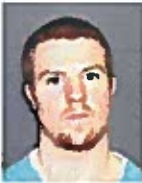
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MISCONDUCT EXAMPLES...

Material and Credible?

Wolfe v. Johnson, 565 F.3d 140 (4th Cir. 2009)
(Wolfe I)

Wolfe v. Clarke, 691 F.3d 410 (4th Cir. 2012)
(Wolfe II)



Material and Credible?

"I told Barber that we knew he had killed Petrole and had a very strong case against him. But that as far as we knew he had no personal problem with Daniel Petrole but that he had killed him for someone else and we believed that person was Justin Wolfe. I explained to him that we needed the information that he had in order to arrest Wolfe."

- Report by Det. Newsome

Material and Credible?

Wolfe v. Clarke, 691 F.3d 410 (4th Cir. 2012)
(Wolfe II)

"I've found in the past when you have information that is given to certain counsel and defendants, they are able to fabricate a defense around what is provided."

— Testimony of the State's Attorney at Brady Hearing

Egregious Misconduct

North Carolina State Bar v. Michael B. Nifong



Egregious Misconduct

"My guess is that there are many questions that many people are asking that they would not be asking if they saw the results."

— Nifong, in a May 4, 2006 Interview with WRAL News

Egregious Misconduct

Pre-trial conference:

"I've turned over everything I have."

Bar hearing testimony:

"My first reaction was a variation of 'oh crap, I didn't give them this?'"

Egregious Misconduct

"Mr. Nifong . . . out of self-interest and self-deception . . . was so clouded by his own self-interest that he . . . wandered off the path of justice. And it had to be put back on course by . . . very extraordinary means."

—Ethics Panel Order disbarring Nifong, June 16, 2007

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